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No. 355

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

CHARLES H. TOMPKINS COMPANY, and J. A. JONES CONSTRUCTION COMPANY, Joint Venturers, PETITIONERS,

v.

LLOYD E. MITCHELL, INC.; HARRY ALEXANDER, INC., and E. C. ERNST, INC., as Joint Venturers, RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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———

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

———

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on July 31, 1958, in the above-styled case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit has not yet been reported, but is appended hereto (pp. 1A-5A). The opinion of the Honorable Alexander Holtzoff, Judge of the United States

District Court for the District of Columbia, is in the form of an Order granting motions for summary judgment for Respondents and denying a motion for summary judgment by the Petitioners, and appears as Page 113 of the Joint Appendix printed for the use of the Court below, nine copies of which are filed in this Court with this Petition.

JURISDICTION

The date of the judgment sought to be reviewed and the time of its entry is July 31, 1958. The statutory provisions believed to confer on this Court jurisdiction to review the judgment in question by Writ of Certiorari are 28 U. S. C. 1254.

QUESTIONS PRESENTED

1. Where a construction contractor sublet to one subcontractor all the work required by the mechanical specifications of the prime contract, and sublet to another subcontractor all the work required by the electrical specifications of the prime contract by incorporating by reference such specifications into the respective subcontracts; and when a dispute arose as to whether certain of the specified work should be performed by the mechanical subcontractor or by the electrical subcontractor, and the contractor directed the mechanical subcontractor to perform the disputed work as a part of his subcontract and withheld from the electrical subcontractor a fund equivalent to the price of the disputed work;—does an action of interpleader or in the nature of an interpleader lie whereby the contractor may deposit into the registry of the court the fund so withheld and require the two subcontractors to interplead as to their respective obligations under their subcontracts and as to their rights to the fund so withheld?

2. Where, under the subcontracts described in Question numbered 1, each subcontractor disclaimed responsibility for the disputed work and claimed that the other one was required to perform it, and both subcontracts provided for

the settlement of disputes by arbitration, and the mechanical subcontractor demanded arbitration and the contractor thereupon demanded of both subcontractors arbitration as to which one of them was responsible for the disputed work; and when the arbiters dismissed the arbitration proceedings as to the electrical subcontractor with the statement that there was no evidence of a dispute between him and the contractor and then absolved the mechanical subcontractor; and when the electrical subcontractor subsequently demanded arbitration, and the second panel of arbiters resolved that the prior award did not prevent them from deciding the dispute on its merits and then absolved the electrical subcontractor; and when these awards were pled by the subcontractors as to bar to an action against them by the contractor in interpleader;—were not these awards in arbitration on their face unresponsive to the questions submitted to the arbiters and in excess of their powers and should not the court have reviewed them when pled in such an action and have set them aside?

3. Under the facts stated in Question numbered 2, where the contractor after the initial award in arbitration, on the theory that the release of the mechanical subcontractor placed the responsibility on the electrical subcontractor, made payments to the mechanical subcontractor as for the disputed work but after the second award in arbitration credited the partial payments on the amount due to the mechanical subcontractor on his original subcontract and continued to withhold from the electrical subcontractor a fund equivalent to the price of the disputed work;—did not these actions of the contractor amount to an unsatisfied Accord and as such constitute no bar to an action in interpleader against both subcontractors to determine their respective obligations for the disputed work and their rights to the fund so withheld?

To each of the above questions the District Court and

the Court of Appeals have reached a negative answer. It is submitted that such decisions are contrary to the decisions of other United States Courts of Appeals and to decisions of this Honorable Court.

STATUTES AND REGULATIONS INVOLVED

There are no pertinent statutes or regulations involved in this matter.

STATEMENT OF THE CASE

Petitioner is a joint venture general construction contractor who entered into a lump sum contract with the Corps of Engineers, U. S. Army, for the construction of an operations building and appurtenant facilities on National Security Administration construction site, Fort Meade, Maryland, on June 22, 1954. However, as is the practice of every general construction contractor, prior to entering into this particular contract, Petitioner received bids or quotations from each of the Respondents, among some 70 other prospective subcontractors or vendors for this large construction undertaking. Respondent Lloyd E. Mitchell, Inc. (hereinafter for brevity called the mechanical subcontractor) offered to perform all of the work described in the Government plans and specifications as mechanical work for and instead of Petitioner and Respondent, Harry Alexander, Inc. (who afterward associated the E. C. Ernst, Inc. with it as a joint venturer) (hereinafter for brevity called the electrical subcontractor) offered to perform all of the work described in the Government plans and specifications as electrical work for and instead of Petitioner.

In conformity with the respective bids or quotations of the mechanical and electrical subcontractors, Petitioner entered into subcontracts with each of the Respondents, incorporating by reference in each such subcontract, the sections of the Government plans and specifications appli-

cable to each subcontractor's work specialty. Such is the practice of the industry and is in no wise unique to this particular Government contract.

Respondent Mitchell, the mechanical subcontractor, had a subcontract bearing date of 2 July 1954 which provided that such subcontractor was to perform for and on behalf of Petitioner, in accordance with its bid, all of the so-called mechanical work required by the Government plans and specifications. This subcontract was for the lump sum of $4,078,500. Respondent Alexander-Ernst, the electrical subcontractor, had a subcontract bearing date of 9 July 1954 which provided that such subcontractor was to perform for and on behalf of Petitioner, in accordance with its bid, all of the so-called electrical work required by the Government plans and specifications. This subcontract was for the lump sum of $3,825,000. Each of the subcontracts provided, in Article VIII thereof, for the settlement of disputes by arbitration and that, pending such settlement, the subcontractor should proceed with the work as directed (Joint Appendix pp. 14 and 53).

During the performance of the subcontracts a dispute arose as to which one of the two subcontractors was required, under its subcontract, to furnish and install certain of the specified work designated as "motor control devices". (Described more fully in Joint Appendix p. 4.) More particularly the dispute was as to whether the motor control devices were required by the mechanical or by the electrical specifications. With notice to the electrical subcontractor, the Respondent Alexander-Ernst, the Petitioner directed the mechanical subcontractor, the Respondent Mitchell, to perform the disputed work subject to arbitration. Mitchell complied with the direction and entered into performance of the disputed work, but demanded arbitration as to his contractual liability therefor, stating in his demand, in part:

"The owner or Contracting Officer does not have

jurisdiction over such disputes since they all involve a determination whether certain work and materials are to be *performed and furnished by us, or by the electrical subcontrator.*" (Underscoring supplied) (Joint Appendix p. 21).

Thereupon the Petitioner demanded of both Respondents the arbitration in one proceeding of the question as to which one of them was obligated to perform the disputed work and stated in such demand, in part:

> "Since the parties agree that all of the disputed work is required under the prime contract and that each item thereof is required either under the mechanical subcontract or under the electrical subcontract, depending upon the relevant sections of the prime contract; what portions of the disputed work is the electrical subcontractor—Alexander-Ernst—obligated to perform? (Joint Appendix p. 25).

Thus the sole question submitted to the arbiters was: whether the disputed work was required by the mechanical or by the electrical subcontract. In their award, however, the arbiters failed to pass upon this question. Instead, they dismissed the proceedings as to the electrical subcontrator upon the alleged ground that there was no evidence of a dispute between him and the Petitioner, and then held that the mechanical subcontractor was not required to perform the disputed work (Joint Appendix p. 47).

In view of the question to be arbitrated, namely, whether the mechanical or electrical subcontractor was to perform the work, when the arbitration award determined that it was not the duty of the mechanical subcontractor to perform the work, the Petitioner presumed that the decision meant that the electrical subcontractor was required to perform the work under his subcontract, and hence deducted an amount of money equal to the value of the work in dispute from payment otherwise due the electrical sub-

contractor. The electrical subcontractor thereupon demanded arbitration under the terms of his subcontract on 14 March 1957 (Joint Appendix p. 87). On its face, the question submitted to the second arbitration panel was identical to the question submitted to the first one, namely: Was the work in question to be performed by the electrical subcontractor as could be inferred from the first arbitration decision, or was the first panel incorrect in their conclusion. Award of this second panel was made on 25 June 1957 (Joint Appendix p. 94) holding:

(1) That in spite of the previous arbitration award it was not precluded from deciding the present dispute on its merits, and

(2) That is was not the obligation of Alexander-Ernst (the electrical subcontractor) to perform the disputed work.

The result of the two Awards, taken together, is to hold that while the two subcontracts together encompass the disputed work it is not included in either of them. This position is absurd on its face and cannot be supported logically or rationally.

In this situation Petitioner is the holder of a fund equivalent to the value of the disputed work. The mechanical subcontractor has performed the work. If he was required by his subcontract to perform the work he has no valid claim to the fund. In that event the electrical subcontractor is entitled to it. On the other hand, if the electrical subcontractor was required by his subcontract to perform the disputed work he has no valid claim to the fund. For in that event the mechanical subcontractor has performed the disputed work which the electrical subcontractor was bound to perform and is entitled to the fund as a payment in addition to his own subcontract.

Since the parties were not able to settle the dispute, by

arbitration or otherwise, Petitioner filed against both Respondents this action in interpleader, in which he prayed to be permitted to deposit into the Registry of the Court the fund which he held, and that the Respondents be required to interplead as to their respective obligations for the performance of the disputed work and their respective rights to the money.

The District Court held that an action in interpleader did not lie, declined to review the regularity of the arbitration proceedings and rendered summary judgment for both Respondents (Joint Appendix p. 113). The Court of Appeals affirmed the judgment of the District Court (Appendix to this Petition pp. 1A-5A).

REASONS FOR GRANTING THE WRIT

Does the Action in Interpleader Lie?

The authorities seem to justify an affirmative answer to this question. These authorities are collected in the Annotation in 70ALR 515-518. The Annotation reads in part as follows:

> "For the purposes of this annotation, it is assumed that all the formal requisites of a bill of interpleader have been complied with. In addition, 'bill of interpleader' as used in this title is taken to include bills in the nature of a bill of interpleader.
>
> "It is generally held that, where there is a dispute between the contractor and lien claimants and others in respect of funds due under a construction contract and still in the hands of the owner, the owner, being willing and anxious to pay the amount due, may maintain a bill of interpleader against such persons for the purpose of determining their respective rights in the fund."

(numerous State Court citations).

Here, the matter is one step removed, namely, that of

the construction contractor (Petitioner) holding the fund against one or the other of two subcontractors. The amount of the disputed work involved is $77,636, and the Petitioner is willing to deposit such amount into court for payment as justice may require. Petitioner should not be required to pay for the work twice. Petitioner admits that at the initiation of the dispute, it was his opinion that the work was encompassed by the mechanical subcontract (Joint Appendix pp. 63-70) but the first arbitration panel seemed to have determined otherwise (Joint Appendix pp. 83-84). However, such opinion or decision on the part of Petitioner would not be sufficient to defeat an action in the nature of interpleader because this Honorable Court has held that where there is more than one adverse claimant to a fund, threatening potential adverse claims, interpleader is an appropriate remedy. (*State of Texas* v. *State of Florida*, 306 U. S. 398, 83 L. Ed. 817). When the award of the first panel arbitrators was announced, Petitioner presumed the obligation was that of the electrical subcontractor and, in default of performance by him, deducted an amount of money equal to the value of the work from his account. The situation of Petitioner is practically identical to that reported in the *Packard* v. *Stevens case*, 58 N. J. Eq. 489, 46 Atl. 250, where several contracts had been awarded to several different contractors to fill in an island. Compensation was to be made by the number of cubic yards of material deposited. The contractors confused their deposits so that the amount due each was in dispute, and it was held that the owner, who was willing and anxious to pay for the whole contract, was entitled to maintain a bill of interpleader to have the rights of each of the contractors in the fund determined. Here, the Petitioner, as prime-contractor-owner has certain work to be performed for him by one of two subcontractors, and the equitable remedy of interpleader, to avoid a multiplicity of suits, and to place all interested parties before the court in a single action, so that a determination may be made which is binding upon all parties, should lie.

Should the Court Review the Arbitration Awards?

Judicial review of arbitration decisions has been recognized by this Honorable Court as an essential process in the pattern of judicial remedies. In the historically important case of *Davy's Executor's* v. *Faw*, 11 U. S. 171, 3 L. Ed. 305, Chief Justice Marshall stated:

> "That the injured party may avail himself of this defense in a court of law, where the excess of power is apparent on the face of the award, is not controverted."

It is submitted, therefore, that the failure of the District Court and the Circuit Court of Appeals to at least review the two separate awards under arbitration in this case was contrary to the decisions of this Honorable Court and those of certain other Circuit Courts of Appeal. In fact, under a different set of circumstances, the Court of Appeals for the District of Columbia did permit judicial review of an arbitration decision. (In *Campbell* v. *Campbell*, 44 App. D. C. 142—Certiorari denied 242 U. S. 642, 61 L. Ed. 542, it was held that even though a matter in litigation was withdrawn and submitted to arbitration, this still did not necessarily determine the validity of the award.) Under the particular facts in that case, the Court of Appeals held that the discontinuance of a pending suit and its submission to arbitration left open to the Plaintiff the remedy of an independent action to vacate the award.

This Honorable Court refused to review another leading case on the subject of judicial review of arbitration awards in the *Texoma Natural Gas Co.* v. *Oil Workers I. U.*, 58 F. Supp. 132, 146; 324 U. S. 872, 89 L. Ed. 2004, where it was stated:

> "(1) THE COURT'S FUNCTION. The arbitration was not in accordance with either the state or federal statute governing arbitrations. It was *under the contract*, and, therefore, was one at common law. The terms of the submission are the relevant portions of

> the contract, and those portions are appropriate for construction by a court of competent jurisdiction, just as are all other provisions of the contract. If the matters determined are not within the terms of the submission (i.e. within the arbitration provisions of the contract) or the arbitrators in their award go beyond the contemplation of the parties, as reflected in the contract, they obviously exceed their jurisdiction, and their award may be set aside in an appropriate proceeding."

and further:

> "Upon entry of the arbitration award, the Company was entitled to a judicial determination of its rights and the validity of the award in a court of competent jurisdiction. This court is an appropriate tribunal for that determination."

To this same effect is the case of *Goodall-Sanford, Inc.* v. *United Textile Workers of America*, 223 F. (2d) 104.

In the case at bar the work required by the mechanical specifications of the prime contract was embraced in one subcontract and that required by the electrical specifications was embraced in the other subcontract. The two subcontracts, therefore, encompassed all the mechanical and electrical work. A dispute arose as to whether certain of the specified work was required by the mechanical specifications or by the electrical specifications. Each subcontractor claimed that the disputed work was not included in his subcontract, but was required by the specifications for which the other one had assumed responsibility.

Both subcontracts provided that pending the settlement of a dispute the subcontractor should proceed with the work as directed by the contractor. With notice to the electrical subcontractor, Petitioner directed the mechanical subcontractor to proceed with the disputed work pending arbitration. The mechanical subcontractor complied but subsequently demanded arbitration as to his contractual responsibility for the work in question. Thereupon Pe-

titioner demanded of both subcontractors the arbitration of the dispute which, in essence, was: Which one of the two subcontractors was required to perform the disputed work?

The Arbiters, to whom the question was submitted, dismissed the proceedings as to the electrical subcontractor with the statement that there was no evidence of a dispute between that subcontractor and Petitioner, and then absolved the mechanical subcontractor from contractual responsibility for the disputed work. Thus the Arbiters avoided the question presented to them. (Joint Appendix pp. 83, 84).

Questions Submitted: (Joint Appendix p. 21) (By Respondent Mitchell)

> "* * * whether certain work and materials are to be performed and furnished by us or by the electrical subcontractor."

And the Petitioner's Demand for Arbitration of 25 June 1956 (Joint Appendix p. 25) put the question:

> "A-2. Since the parties agree that all of the disputed work is required under the prime contract and that each item thereof is required either under the Mechanical subcontract or under the Electrical subcontract, depending upon the relevant Sections of the prime contract: what portion of the disputed work is the Electrical subcontractor, Alexander Ernst, obligated to perform?"

Award of Arbitrators: (Joint Appendix p. 47)

> "1. * * * and the motion of ALEXANDER ERNST to be dismissed as a party, to this arbitration is granted."
>
> "2. That it is not the contractual obligation of Lloyd E. Mitchell, Inc. under the above described subcontract to furnish or install any of the work * * *."

When the Petitioner withheld from the electrical subcontractor a fund equivalent to the price of the disputed work, the electrical subcontractor demanded arbitration as to his contractual responsibility for the disputed work. However stated, the question in dispute still was: Which of the two subcontractors was responsible for the work in question? The second panel of Arbiters made an award in which they resolved that the prior award did not prevent them from deciding the dispute on its merits and that the electrical subcontractor was not responsible for the disputed work.

Questions Submitted: (Joint Appendix p. 90) (By Respondent Alexander Ernst)

"(a) and (b) * * * may the Contractor now create a dispute on the same facts in regard to the same items of work?

and

"(c) In view of items (a) and (b) above, may the Contractor under the terms of the subcontract, or under the terms of any existing laws or regulations, arbitrarily withhold monies due the Subcontractor, with no justification except the reiteration of a dispute previously decided and rejected?"

And your Petitioner presented the same question as the prior arbitration: (Joint Appendix pp. 92, 93)

"It is submitted that Paragraph 1 of the Award of Arbitrators dated 20 November 1961 and designated as Case No. C-12253, WASH C-156 holding that there was no dispute between Tompkins-Jones and Alexander-Ernst and dismissing Alexander Ernst as a party, implied by such decision that the furnishing and installation of work called for in items 1 through 13 *must* be an obligation of Alexander Ernst as the electrical subcontractor, since such work was not included within the specific terms of the Lloyd E. Mitchell, Inc. mechanical subcontract * * *."

Award of Arbitrators: (Joint Appendix, p. 94)

> "1. That the prior arbitration award dated November 20, 1956 in the Matter of the Arbitration between Tompkins-Jones and Lloyd E. Mitchell, Inc. and Alexander Ernst, Inc., does not preclude the present panel of arbitrators from deciding the dispute presented in the present proceeding on its merits.
>
> "2. That, it is not the obligation of Alexander-Ernst, under its subcontract with Tompkins-Jones, to furnish or install any of the work * * *".

Faced with this failure of arbitration to settle the dispute Petitioner applied to the United States District Court for relief in an action for interpleader. The District Court refused to examine the awards to determine whether they were responsive to the questions submitted to arbitration. The United States Court of Appeals assumed the awards were binding without examining them. Since the two awards cannot be supported on any logical or rational basis they should be set aside and the case proceed to a determination of the issues between the parties.

Was the With-Holding of the Fund Justified?

In urging an affirmative reply to this question, Petitioner would point to the maxim in legal usage that parties must give a practicable, workable interpretation to any document in dispute and not make an arbitrary interpretation which would lead to litigation. Accordingly the Petitioner sought to give effect to the first Award in arbitration by making payments to Respondent Mitchell for the disputed work and withholding the equivalent of such payments from Respondent Alexander-Ernst. However, when the Award in the second arbitration was announced Petitioner had no alternative but to credit the payments which it had made to the Respondent Mitchell for the disputed work against his subcontract and apply to the United States District Court for help in settling the dispute.

The initial agreement of Petitioner to abide by the first Award may be said to be an Accord to pay to the mechanical subcontractor the amount of his subcontract and also an additional amount for the disputed work. When after the second award and prior to complete payment under the Accord, Petitioner credited the partial payment made to the mechanical subcontractor for the disputed work on the amount due him under his subcontract, the Accord failed of satisfaction. Hence the unsatisfied Accord is no bar to the action.

The doctrine laid down in the case of *Texas* v. *Florida*, 306 U. S. 398; 83 L. Ed. 817, on interpleader has been followed by Circuit Courts of Appeals (other than the United States Court of Appeals for the District of Columbia Circuit) in numerous instances, permitting interpleader to quell the fear of vexatious litigation.

In the 5th Circuit in the case of *U. S.* v. *Munn*, 105 F. (2d) 578 (July 15, 1939) a surety was permitted to interplead some 70 claimants, even though the "fund" was not equal to the total of the possible claims; even though the surety had a pecuniary interest in the outcome of the litigation; and even though the claims did not have a common source. Some 16 years later, this same circuit, in the case of *Clyde Austin, et al.* v. *Texas-Ohio Gas Co.*, 218 F. (2d) 739 (February 2, 1955) permitted the use of interpleader as a remedy to forestall litigation on various numerous stock claims.

In the 8th Circuit, the case of *Hunter* v. *Federal Life Ins. Co., et al.*, 111 F. (2d) 551 (May 8, 1940) the Court permitted a "stakeholder" acting in good faith, to maintain a suit in interpleader for the purpose of ridding himself of vexatious and expensive resistance of adverse claims, even though he believed that only one of the possible claims was meritorious.

In the 10th Circuit, in the case of *Holcomb* v. *Aetna Life Ins. Co.*, 228 F. (2d) 75 (August 3, 1955) writ of certiorari

denied 3/12/56, 76 S. Ct. 473, the Court held that a Federal Court may enjoin litigation in a state court proceeding under the terms of 28 USCA 1335 where an appropriate action of interpleader is brought in such Federal Court.

This Honorable Court clearly set forth the doctrine to be followed on Page 407 of the *Texas* v. *Florida* decision, *supra:*

> "While in point of law or fact only one party is entitled to succeed, there is danger that recovery may be allowed in more than one suit. Equity avoids the danger by requiring the rival claimants to litigate before it the decisive issue, and will not withhold its aid where the plaintiff's interest is either not denied or he does not assert any claim adverse to that of the other parties, other than the single claim, determination of which is decisive of the rights of all. * * *"

It is submitted that the decisions of the District and Circuit Court of Appeals in this case are clearly conflicting with the principles announced in the *Texas* v. *Florida* decision, *supra,* and with the broad principles announced in the 5th, 8th and 10th Circuits cited above. Future litigants invoking the equitable principles of interpleader to avoid vexatious litigation should have a pronouncement from this Honorable Court consistent with the liberal Circuits above cited assuring them of judicial consideration of their legal difficulties.

CONCLUSION

The great volume of contracts written thoughout the United States renders the issues in this case of primary importance. The settlement of disputes by arbitration has greatly relieved Courts of their overcrowded dockets. But unless the process of arbitration is reviewable in the Courts, serious injustices may result. Arbiters are bound to decide the precise question submitted to them. In this case, the Petitioner had a contract right to require certain work to be performed by one of two subcontractors. The

question of which one of two was bound to perform the work was submitted to arbitration by agreement of the parties. The arbiters have, in effect, by their awards, re-written the two subcontracts so that Petitioner may not require the work from either one of the subcontractors. The result is that, without judicial relief, Petitioner must pay for the same work twice. This is a patent injustice. The time honored equitable remedy of interpleader seems an appropriate one by which the issues in this case may be decided. For these reasons, and for the reason that it is sincerely believed that the decisions below are in direct conflict with the spirit and intent of decisions of this Honorable Court and other Circuit Courts of Appeals, it is respectfully requested that this case be reviewed by the Supreme Court and the judgments of the Courts below be reversed.

Respectfully submitted,

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Appendix to Petition for Writ of Certiorari

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,280

CHARLES H. TOMPKINS COMPANY, and J. A. JONES CONSTRUCTION COMPANY, Joint Venturers, APPELLANTS

v.

LLOYD E. MITCHELL, INC., and HARRY ALEXANDER, INC., and E. C. ERNST, INC., as Joint Venturers, APPELLEES

Appeal from the United States District Court for the District of Columbia

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Decided July 31, 1958

Mr. O. P. Easterwood, Jr., with whom *Mr. Alan Johnstone* was on the brief, for appellants.

Mr. Howard H. Conaway, of the bar of the Court of Appeals of Maryland, *pro hac vice*, by special leave of Court, with whom *Mr. Milton M. Gottesman* was on the brief, for appellee Lloyd E. Mitchell, Inc.

Mr. Nicholas J. Chase, with whom *Mr. Robert W. McChesney, Jr.*, was on the brief, for appellees Harry Alexander, Inc., and E. C. Ernst, Inc.

Before WHITAKER, Judge, United States Court of Claims,* and WILBUR K. MILLER and BAZELON, Circuit Judges.

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* Sitting by designation pursuant to the provisions of Section 291(a) of Title 28, United States Code.

WILBUR K. MILLER, *Circuit Judge:* Charles H. Tompkins Company and J. A. Jones Construction Company were, as joint venturers, the general contractor on a large construction project. By separate subcontracts, they engaged Lloyd E. Mitchell, Inc., to do the mechanical work required by the plans and specifications, and Harry Alexander, Inc., and E. C. Ernst, Inc., joint venturers, to do the electrical work required thereby.

In the course of construction, a dispute arose between Tompkins-Jones and Mitchell as to whether the latter's subcontract required it to perform certain items of work included in the general contract. Mitchell denied the obligation and demanded arbitration as provided in its subcontract, but in the meantime proceeded with performance of the disputed items as its subcontract stipulated it should do, upon request, pending resolution of the controversy. Tompkins-Jones agreed to the arbitration proceeding, and attempted to make Alexander-Ernst parties thereto, over the latters' protest.

Arbitration was held. The arbitrators dismissed Alexander-Ernst as parties on the ground there was no evidence of a dispute between them and Tompkins-Jones. They found it was not Mitchell's contractual obligation to do the disputed work, and directed Tompkins-Jones to pay Mitchell the actual cost of labor and materials used in performing it pursuant to Tompkins-Jones' demand.

Tompkins-Jones agreed to comply with the arbitration award and requested Mitchell promptly to complete not only its subcontract but also the work about which arbitration had been held. Mitchell did so and, as it performed the extra work, it sent invoices therefor (with trifling exceptions not pertinent here), which Tompkins-Jones paid.

About two months after the award, Tompkins-Jones informed Alexander-Ernst that they—not Mitchell—were contractually obliged to do the disputed work. Alexander-Ernst denied the obligation and demanded arbitration of

which Tompkins-Jones agreed. After a hearing, the arbitrators decided it was not the obligation of Alexander-Ernst under their subcontract to perform the items of work in dispute.

Although the two arbitration awards had determined that neither subcontractor was contractually obligated to do the work in dispute, and although it had paid Mitchell the sum of $77,636 for performing it as required by the first award, Tompkins-Jones then withheld that sum from moneys due Mitchell and a similar sum from funds due Alexander-Ernst under their subcontracts. They then filed this action in interpleader against both subcontractors, asking the court to decide which was required by its subcontract to do the disputed work and which was entitled to be paid for it.[1]

Mitchell relied upon the first arbitration decision as conclusive that its subcontract did not include the disputed items, alleged that it had been paid therefor quite apart from its subcontract, and said it did not claim the witnheld money as compensation therefor. Alexander-Ernst relied upon the second arbitration decision as conclusively absolving them from any contractual obligation to perform the work in dispute, and disclaimed any right to the withheld money growing out of that work.

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[1] This action by appellants is thus described by them in their brief:

> "Appellant thereupon charged the payments which it had made for the disputed work to appellee Mitchell against the price of its subcontract and established a reserve in like amount against the subcontract price of Alexander-Ernst and filed action in the United States District Court for the District of Columbia seeking to interplead the two subcontractors so that a determination could be made by the Court as to which of them was required under its subcontract to perform the disputed work, and which one was entitled to the fund which appellant held as for the price of the disputed work."

Summary judgment went for the two subcontractors, from which Tompkins-Jones appeal. They assert, as they did in the District Court, that the disputed work fell within the scope of one of the two subcontracts, and that in paying Mitchell for its performance, they had in effect made a payment on the price of one or the other of the two subcontracts.

The argument ignores the fact that Tompkins-Jones were bound by the two arbitration awards, which held that neither subcontractor was obligated to do the disputed work. Although they had paid Mitchell for performing it, they apparently reasoned that, since the items were embraced in the general contract, they were included in one or the other of the two subcontracts, despite the decisions of the arbitrators. Because of this erroneous assumption, they created what was in fact an artificial fund in hand with fictional adverse claimants thereto, by withholding an amount equal to the cost of the extra items from moneys due under each of the subcontracts. In these circumstances, interpleader did not lie.

Moreover, the facts developed in the evidence conclusively show, not only that an action in interpleader was improper, but also that the appellants were not entitled to any other sort of relief, so Rule 54(c), Federal Rules of Civil Procedure,[2] does not apply. The situation simply is

[2] The Rule is as follows:

"(c) Demand for Judgment. A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."

that Tompkins-Jones had to bear the cost of the disputed items which were within the terms of their general contract, but have been authoritatively determined not to be embraced in either subcontract.

Affirmed.

Office Supreme Court, U.S.
FILED
OCT 10 1958
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 355

CHARLES H. TOMPKINS COMPANY, AND J. A. JONES CONSTRUCTION COMPANY, JOINT VENTURERS,
Petitioners,

v.

LLOYD E. MITCHELL, INC.; HARRY ALEXANDER, INC., AND E. C. ERNST, INC., AS JOINT VENTURERS,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT, LLOYD E. MITCHELL, INC., IN OPPOSITION

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The Daily Record Co., Baltimore 3, Md.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT, LLOYD E. MITCHELL, INC., IN OPPOSITION

OPINIONS BELOW

The opinions below are adequately set forth in the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

Respondent Mitchell is dissatisfied with the presentation of the Questions Presented by Petitioner. In its opinion the questions presented are:

1. On a building construction project, where a Board of Arbitration has determined that it is not the obligation of the mechanical subcontractor to perform certain work under its subcontract and another Board of Arbitration has determined that it is not the obligation of the electrical subcontractor to perform said work under its subcontract, following the first of which the prime contractor agrees with the mechanical subcontractor, in writing, that it will comply with the award in favor of said subcontractor, orders only the mechanical subcontractor to perform the work as an extra, accepts such extra work and pays for it, may the prime contractor properly use an interpleader proceeding in order to vacate the two awards and re-litigate the alleged liability for the work of one of the two subcontractors through the device of backcharging the previously disputed work against funds otherwise owed to each subcontractor, and by citing each subcontractor as a claimant, although neither claims the price of the disputed work?

2. When the issue presented in an arbitration between a prime contractor and a mechanical subcontractor is whether it is the contractual duty of the mechanical subcontractor to perform certain disputed work, is an award finding that it is not the contractual duty of the mechanical subcontractor to perform the disputed work void on the ground that it is unresponsive?

3. Under the facts stated in Question 1, is the prime contractor estopped to challenge the award in favor of the mechanical subcontractor?

STATEMENT OF THE CASE

The dispute involved in this case first arose between Petitioner and Respondent Mitchell. Respondent Mitchell has no contractual relation with the other Respondent, Alexander-Ernst. By letters dated October 19, and 26, 1955, Petitioner advised Respondent Mitchell that Petitioner had concluded it was the duty of Respondent Mitchell to perform certain work and directed Respondent Mitchell to perform. Under its subcontract, Respondent Mitchell was required to honor this direction (Joint App. 63 and 70). However, Respondent Mitchell demanded arbitration with Petitioner alone by letter dated May 25, 1956 (Joint App. 74). In this letter, Respondent Mitchell stated:

> "The matters in controversy between us are as follows:
>
> > 'Is it the contractual obligation of this company, under Subcontract Number 1132-1 dated July 2, 1954, as amended: (to perform the disputed work.)'."

Petitioner thereupon sought to have Respondent Alexander-Ernst joined as a party to the arbitration (Joint App. 76). This was opposed by Respondent Alexander-Ernst on the ground that it had no dispute with Petitioner or with Respondent Mitchell (Joint App. 79, 81).

The award specifically held that "there is no evidence before the arbitrators in this proceeding of any dispute between Tompkins-Jones and Alexander-Ernst which gives the arbitrators jurisdiction over Alexander-Ernst. * * *" so that Respondent Alexander-Ernst was dismissed. The award further specifically answered the second issue pre-

sented by finding "That it is not the contractual obligation of Lloyd E. Mitchell, Inc. under the above described subcontract to furnish or install any of the (disputed work)" (Joint App. 47).

By letter dated December 5, 1956 Petitioner agreed to comply with this decision of the American Arbitration Association (Joint App. 26). At the same time, Petitioner requested Respondent Mitchell promptly to complete all items of Respondent Mitchell's subcontract and promptly to complete the items of work upon which the arbitration had been held (Joint App. 26). Based upon this agreement and the Award of Arbitrators, Respondent Mitchell continued to perform the previously disputed items of work and, as each item of the work was completed by Respondent Mitchell, it sent an invoice therefor to Petitioner stating that the invoice was submitted in accordance with the decision rendered by the American Arbitration Association (Joint App. 27-45). Except for insignificant amounts representing work in progress at the time this suit was instituted, each of these invoices was paid to Respondent Mitchell by Petitioner without comment or argument.

On January 14, 1957 Petitioner advised Respondent Alexander-Ernst that it was the latter's obligation to perform the disputed work (Joint App. 85), and Petitioner withheld from payments otherwise due to Respondent Alexander-Ernst the amount of Respondent Mitchell's invoices for the disputed work.

Responsibility was denied and arbitration demanded by Respondent Alexander-Ernst (Joint App. 87). The Board held "That it is not the obligation of Alexander-Ernst, under its subcontract with Tompkins-Jones, to furnish or install any of the (disputed work)" (Joint App. 94).

Faced with the prospect that it had neglected to put the disputed work in either subcontract, Petitioner contrived the scheme of backcharging the full value of the disputed work against funds otherwise due to Respondent Mitchell and also of backcharging the full value of the work against funds otherwise due to Respondent Alexander-Ernst. Having thus artificially created these two funds, Petitioner filed a Complaint in Interpleader in the United States District Court for the District of Columbia (Joint App. 1). This Complaint made no mention of the two previous arbitrations and awards, but alleged that there was a dispute between Respondents "as to which subcontract required the performance of certain work." Petitioner sought to have the District Court determine to whom the "fund" should be paid and thus indirectly sought a review on the merits of the two previous arbitration awards.

When subsequent pleading by the Respondents brought forth the full facts, respective Motions of Respondents for Summary Judgment were granted. This decision was unanimously affirmed by the United States Court of Appeals for the District of Columbia Circuit.

ARGUMENT

I. There is No Conflict of Decision With Another Court of Appeals.

The consideration governing review on certiorari which Petitioner principally alleges is applicable to the instant Petition is that the decision of the U. S. Court of Appeals for the District of Columbia is in conflict with the decisions of other Courts of Appeals on the same matter. To support this contention, Petitioner cites a number of decisions of U. S. Courts of Appeals, including *U. S. v. Munn*, 105 F. 2d 578 (5th Cir., 1939), which was a claim for total permanent disability benefits under an insurance policy.

(Apparently Petitioner intended to cite *Standard Surety & Casualty Co. v. Baker*, 105 F. 2d 578 (8th Cir., 1939)).

While interpleader was allowed in the cases cited, they are so clearly distinguishable on the facts as to make manifest that there is no conflict. In each of the cases cited the most basic essentials of interpleader were present. There was a fund in dispute, to which there were claimants, actual or potential, whose claims were adverse. In the case at bar there was no fund until Petitioner artificially created one by backcharging the value of the disputed work against funds otherwise owed to each Respondent under their respective subcontracts. If this "fund" represents the value of the work, neither Respondent claims it. Since Respondent Mitchell has done the work under a new and special contract with Petitioner and has been paid for it, it has no claim. Respondent Alexander-Ernst has not done the work so that it cannot and does not claim the value of it. If the fund is considered as what it actually is, namely two equal sums withheld under each subcontract, then each Respondent claims only its share and the claims are not adverse. By this device of backcharging each Respondent, Petitioner seeks to create a dispute where none exists, in order to re-litigate the merits of the arbitration cases, a question which is collateral to the question of who is enfitled to a fund.

Far from being in conflict with the decisions of other circuits, the decision sought to be reviewed conforms with the only analogous case which counsel for Respondent Mitchell have discovered. That case is *Bierman v. Marcus*, 246 F. 2d 200 (3rd Cir., 1957), cert. den., *sub nom., Milmar Estate, Inc. v. Marcus*, 356 U.S. 933, 2 L. Ed. 2d 762, 78 S. Ct. 744 (April 14, 1958). There two stockholders brought a Bill of Interpleader to determine to whom the balance of the purchase price of their stock should be paid. They

joined as defendants the vendor of the stock and the issuing corporation, alleging that the issuing corporation might claim the balance. Subsequent pleading disclosed that the plaintiff stockholders were the sole stockholders of the corporation and that the true purpose of the bill was to obtain an adjudication of certain disputes with the vendor, including his asserted right to rescind for fraud. The Third Circuit held that the Bill should have been dismissed.

At 246 F. 2d 203-204, the Third Circuit stated:

> "Actually, what has been done in this suit has been to misuse interpleader, based on mere pretense of adverse claims to a fund, to obtain adjudication of controversies other than entitlement to that fund. While 'the normal duty of a district court (is) to permit interpleader liberally to relieve parties of the hazards and vexations of conflicting claims against them' (cit. om.), the asserted hazards and vexations here were as unreal as the asserted depredations of the casual ejector in the classic common law action to try land titles.
>
> "The interpleader action should have been dismissed once its true character was disclosed, as presenting no bona fide issue of the type essential to this form of equitable relief, and therefore, constituting an imposition upon the jurisdiction of the court.
>
> "Accordingly, the judgment will be vacated and the cause remanded with instruction to dismiss the complaint as not being predicated upon any bona fide fear of vexatious conflicting claims."

This is substantially the same reasoning used by the U. S. Court of Appeals for the District of Columbia Circuit in affirming the judgment of the District Court in favor of Respondents. The Court below in its opinion stated (Petitioner's Appendix, 4A):

> "They (Petitioner) assert, as they did in the District Court, that the disputed work fell within the scope of

one of the two subcontracts, and that in paying Mitchell for its performance, they had in effect made a payment on the price of one or the other of the two subcontracts.

"The argument ignores the fact that Tompkins-Jones were bound by the two arbitration awards, which held that neither subcontractor was obligated to do the disputed work. Although they had paid Mitchell for performing it, they apparently reasoned that, since the items were embraced in the general contract, they were included in one or the other of the two subcontracts, despite the decisions of the arbitrators. Because of this erroneous assumption, they created what was in fact an *artificial fund* in hand with *fictional adverse claimants* thereto, by withholding an amount equal to the cost of the extra items from moneys due under each of the subcontracts. In these circumstances, interpleader did not lie." (Emphasis supplied.)

II. There is No Conflict With a Decision of This Court on a Federal Question.

U. S. Sup. Ct. Rule 19(1)(b) sets forth as a consideration governing review on certiorari the conflict between a Court of Appeals decision and one of this Court on a federal question. In the matter at hand, there is no federal question involved. The Petitioner does not cite or set forth any constitutional provision, federal statute, treaty, rule or regulation which it contends is involved. The real question involved is whether Petitioner may set aside the two arbitration awards. These arbitrations were held under provisions of the respective subcontracts and not under any national or District of Columbia statute. The arbitrations were, therefore, common law arbitrations. The question of the finality of the two awards is a question of the common law of the District of Columbia. In *Del Vecchio v. Bowers*, 296 U.S. 280, 80 L. Ed. 229, 56 S. Ct. 190 (1935), this Court stated that it will not ordinarily review on certiorari the

decisions of the United States Court of Appeals for the District of Columbia Circuit which do not constitute a precedent of general application but simply declare the common law of the District.

Petitioner argues, however, that the decision of the Court below is in conflict with the decision of this Court in *Texas v. Florida*, 306 U.S. 398, 83 L. Ed. 817, 59 S. Ct. 563 (1939). That case presented two questions, one procedural and jurisdictional, the other relating to the merits. On the first issue it was held that the claims of the states involved presented a case or controversy, in the nature of interpleader, within the original jurisdiction of this Court. Thus the federal question therein presented related to the jurisdiction of this Court in suits between states, a question not relevant to the present Petition. There is no conflict between the granting of interpleader in *Texas v. Florida* and the decision below denying interpleader since *Texas v. Florida* involved a bona fide dispute between actually adverse claimants. The second holding of *Texas v. Florida* was the determination of the state of domicile of a decedent. That question is in no way involved in the present Petition.

III. There is No Important Question of Law

The decision below presents no important question of law. The holding of the case applies only to the parties involved and does not set forth any precedent of general application. In essence Petitioner contends that one of the two subcontractors must have had the obligation to perform the disputed work. Petitioner sought to limit both arbitration proceedings to a question making this assumption which the Court below labeled as "erroneous". When this stratagem failed Petitioner asserted the awards were unresponsive.

Respondent Mitchell's Statement of the Case makes manifest that the awards were responsive. However, a review of the question of responsiveness *vel non* involves no question of general application. Such a review would involve consideration of the exchanges of letters requesting the arbitrations. These letters were drafted by the respective parties, using their own language with reference to their own specific, immediate contentions. Such matters are of necessity limited only to the instant specific fact situation. Thus a determination by this Court would not be a precedent applicable to the future dealings of others.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

CHARLES H. TOMPKINS COMPANY and L. A. JONES CONSTRUCTION COMPANY, Joint Venturers, *Petitioners*,

v.

LLOYD E. MITCHELL, INC.; HARRY ALEXANDER, INC.; and E. C. ERNST, INC., Joint Venturers, *Respondents*.

BRIEF OF RESPONDENTS HARRY ALEXANDER, INC. AND E. C. ERNST, INC., JOINT VENTURERS, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE

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OCTOBER TERM, 1958

No.

CHARLES H. TOMPKINS COMPANY, and J. A. JONES CONSTRUCTION COMPANY, Joint Venturers, *Petitioners,*

v.

LLOYD E. MITCHELL, INC.; HARRY ALEXANDER, INC., and E. C. ERNST, INC., as Joint Venturers, *Respondents.*

BRIEF OF RESPONDENTS HARRY ALEXANDER, INC., AND E. C. ERNST, INC., JOINT VENTURERS, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

QUESTION PRESENTED

May a general contractor through the guise of an action in interpleader create a fictitious case between two subcontractors when neither subcontractor asserts any claim against the other or against the general contractor and where no fund exists to which the subcontractors are claiming?

STATEMENT OF THE CASE

Petitioner, a general contractor, entered into a contract with the Corps of Engineers, United States Army, for the construction of work at Fort Meade, Maryland. Following the submission of a bid by Respondent, Alexander-Ernst, Petitioner indicated its intention to let the electrical work to them. In negotiations prior to the execution of a written contract, a dispute arose concerning whether certain work known as "motor control" devices was included in the electrical subcontract to be performed by Alexander-Ernst, and it was determined that this work should not be included, as indicated by Petitioners' own letter of October, 1955. (J. A. 54).

During the performance of the electrical subcontract, a dispute arose between Respondent Mitchell, Inc., the mechanical subcontractor as to whether certain work including the "motor control" devices should be performed by that Company under its subcontract (J.A. 7, 54, 63, 70). Petitioner insisted that such work should be performed by Respondent Mitchell, Inc. and it was (under protest). Mitchell, Inc. demanded arbitration (J.A. 63, 70, 74). Petitioner made a cross-demand for arbitration upon Respondent Alexander-Ernst (J.A. 76). Despite the fact that Respondent Alexander-Ernst had no dispute with either Petitioner or Respondent, Mitchell, Inc., it was required to participate in the arbitration in order to protect its interest (J.A. 79, 80). The arbitrators decided that Alexander-Ernst was not a proper party to the arbitration and held that Mitchell, Inc. was not obligated to perform the work (J.A. 83).

Petitioner thereafter demanded that Alexander-Ernst assume the obligation to pay for this work (J.A.

85). A second arbitration was held in which it was determined that Respondent Alexander-Ernst was not obligated to perform the work (J.A. 94). Meanwhile, Mitchell, Inc. had performed the disputed work and had been paid for same. Petitioner then proceeded to back-charge both Respondents for the cost of the work performed on the "motor control" devices on its books and retained funds which would otherwise have been paid to Respondents for other unrelated work performed on the project (J.A. 10, 56, 57, 123).

Petitioner brought an action in the United States District Court for the District of Columbia seeking to interplead the Respondents and seeking to pay into the registry of the court money owed to the subcontractors for work performed other than the disputed work. The United States District Court granted Respondents' Motions for Summary Judgment. The United States Court of Appeals for the District of Columbia affirmed the decision of the lower court in a unanimous decision.

The foregoing factual recitals have been made in the interest of clarity and accuracy.

ARGUMENT

1. Two arbitration boards have held that neither Respondent, Mitchell, Inc., nor Respondent Alexander-Ernst, Inc. undertook to perform the disputed work. As the Court of Appeals pointed out, Petitioner is clearly bound by those awards. Petitioner did not challenge the validity of these awards in its Complaint in the United States District Court. Petitioner now seeks to have this Court collaterally attack the arbitration awards which it has never directly attacked and relitigate questions of fact which have been con-

sistently determined against it by all forums before whom the matter has been submitted for consideration. No precedent exists for such action.

Petitioners' case is pitched upon the factual claim that the work which was in dispute must necessarily have been part of the obligation of Respondent Mitchell in the mechanical subcontract or of the Respondent Alexander-Ernst as part of the electrical subcontract. This proposition has been argued and tried as a factual issue, has been disputed as such by both respondents and has been determined against Petitioners.

Petitioners argue that they must be correct in the foregoing position because Respondent Mitchell undertook to perform "all of the so-called mechanical work" and Respondent Alexander-Ernst undertook to perform "all of the so-called electrical work". This, too, was a factual issue in the earlier proceedings and Petitioners neglect to recite the fact that there was evidence showing that this claim was also unfounded. But this really is the same point previously discussed, simply presented in a somewhat different way.

After arguing all of the same points which are presented in this petition before two arbitration panels and having been rejected on both occasions, Petitioners went before the United States District Court and filed an action in interpleader, totally ignoring the arbitration awards, making no challenge to the validity of said arbitration awards, and took the position that it was a disinterested stakeholder caught between conflicting claims of two subcontractors. Thereafter, when the Respondents herein come forward with the contention that neither Respondent was claiming the alleged fund made up of monies due for

so-called disputed work and pointed out that the work had actually been performed by Respondent Mitchell, and paid for by Petitioner, and, that the only funds in the hands of Petitioners were due for other work not in dispute, Petitioners claimed that the arbitration awards involved were invalid. A complete record was developed by the parties going to the validity or invalidity of the arbitration.

The United States District Court held that this was no proper situation for an interpleader action and it granted a summary judgment to Respondents, denying Petitioners' Motion for Summary Judgment. The Court of Appeals fully agreed with this and, in view of the evidence which the District Court had had before it, added, in substance, that even if some relief other than interpleader might have been appropriate under some facts, "the facts developed in the evidence conclusively show, not only that an action in interpleader was improper, but also that the appellant were not entitled to any other sort of relief, so Rule 54(c), Federal Rules of Civil Procedure, does not apply."

2. Petitioner is not a disinterested stakeholder caught between conflicting claims of two subcontractors. There has never been any dispute between Respondents. The only disputes between Respondents and Petitioner were decided against Petitioner in the two arbitration proceedings. The "fund" held is simply money owed to Respondents for unrelated work. Hence, none of the essential prerequisites for an Action of Interpleader are present.

3. Even if it is assumed that the District Court should have considered the validity of the arbitration awards in acting on Petitioner's Action of In-

terpleader, the record establishes that no serious challenge to the validity of the awards could have been made. Hence, as Petitioner was not entitled to any type of relief, Rule 54 (c) of the Federal Rules of Civil Procedure clearly was inapplicable.

4. An examination of the authorities cited in the Petition will quickly expose the error of the contentions made by Petitioner that the decision in the instant case conflicts with the decisions of this Court or with the decisions in the other circuits.

5. It is clear that the decision below is correct; it does not conflict with the decision of another court of appeals; it has not decided any state or territorial question in a way in conflict with applicable state or territorial law; it has decided no Federal question which should be settled by this Court; it has not decided any question in any way which conflicts with applicable decisions of this Court; it has not departed from the accepted course of judicial proceedings or permitted such a departure by a lower court as to call for an exercise of this Court's power of supervision.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be denied.

Respectfully submitted,

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